Supreme Court, U.S.
FILED
FEB 2 1994
OFFICE OF THE CLERK

No. 93-830

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DAVIS SUPERMARKETS, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD and UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL UNION 23, AFL-CIO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Respondent, United Food and Commercial Workers International Union, Local 23, AFL-CIO-CLC ("Local 23"), has identified a number of inaccuracies or omissions in Petitioner's Statement of the Case that may be material to the Court's consideration of the Petition for Writ of Certiorari. They are as follows:

1. Petitioner states: "On May 23, 1993, approximately 12 individuals appeared at the Hempfield store and engaged in conduct including blocking customer ingress and egress to the supermarket, intimidating customers and em-

ployees, leading at least one customer to express concern for his safety and that of his automobile, using profane language and making threats and obscene gestures, and littering the supermarket premises." Pet. at 9 (citations to the deferred appendix omitted).[1] That statement both contradicts the record and relies on testimony discredited by the National Labor Relations Board ("Board" or "NLRB"). The Administrative Law Judge ("ALJ") found that at no time did the picketers and handbillers interfere with customer ingress or egress or with store deliveries, "act[] in an obstructive manner or otherwise conduct[] themselves in any way but a peaceful manner." 175a-177a and n.112; 183a; 185a. In so doing, the ALJ discredited testimony by Petitioner's witnesses to the contrary. 175a-177a; 183a. The Board affirmed the ALJ's findings and credibility resolutions, 38a and n.2, and the Court of Appeals upheld the Board's order "in all respects." 2a.

2. Petitioner's Statement of the Case does not directly state that six of the individuals who picketed and handbilled at the Hempfield store *were Petitioner's own employees*, including employees it had unlawfully discharged. 30a; 179a; 185a. *Cf.* Pet. at 11. Petitioner also omits mention of the important fact that the purpose of the picketing and handbilling was to protest Petitioner's unfair labor practices. 4a; 28a; 30a; 39a; 101a-102a; 179a.[2]

3. Petitioner's Statement of the Case does not directly state that Petitioner, while denying Local 23 and employees access to its property to picket and distribute

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[1] References to the Petition for Writ of Certiorari are designated as: Pet. at ——. References to the appendix filed with the Petition for Writ of Certiorari are designated as: ——a.

[2] As the Court of Appeals observed, the Board views the right to protest unfair labor practices as one of the core rights guaranteed in Section 7 of the National Labor Relations Act ("Act"). 31a. *See, e.g., United Supermarkets*, 283 N.L.R.B. 814, 815-16 (1987); *Jean Country*, 291 N.L.R.B. 11, 13 & 17 (1988).

handbills to the public, granted other organizations access to its property. 28a-29a; 31a-32a; 39a-41a; 175a.[3] *Cf.* Pet. at 10. The Court of Appeals found Petitioner's "discriminatory behavior was particularly egregious" because Petitioner allowed Steelworkers' representatives "*inside* the store to recruit employees and to distribute authorization cards and contracts." 31a.

4. Petitioner's Statement of the Case fails to note the lack of any record evidence that Petitioner had a policy barring access to its premises by outside organizations or off-duty employees. *See* 41a n.6.

5. Petitioner states that notwithstanding a May 28, 1986 state court injunction "enjoining Local 23 from entering the store grounds and limiting pickets to three at each parking lot entrance . . ., Local 23 and Petitioner agreed to permit Local 23 greater access to the property than that provided in the injunction." Pet. at 9. This statement is misleading. On May 23, 1986—the day the picketing and handbilling commenced—Petitioner filed a civil trespass suit in state court. The next day, the court entered a consent order whereby *during the term of the order* picketers were enjoined from entering Petitioner's property and handbillers had limited access to a portion of the parking lot at Petitioner's Hempfield store; *the order only remained in effect until May 28, 1986.* 105a-106a. On May 28th, the court entered a second order enjoining Local 23 and its agents:

> from picketing [Petitioner's] place of business except for three pickets who may be stationed at each entrance to the parking lot of the premises, *off the property of* [*Petitioner*], which pickets may carry informational signs and pass out leaflets but shall not

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[3] Indeed, on the same day it refused to allow the pickets to remain in front of its store, Petitioner permitted a charitable organization to set up a table on its storefront sidewalk and sell raffle tickets for a car parked in the lot in front of the store. 39a.

> physically impede or stop the movement of the traffic to and from the parking lot. Joint Exhibit 4.

109a (emphasis added). Thus, after May 28, 1986, there was no formal agreement between Petitioner and Local 23 permitting picketers and handbillers *any* access to Petitioner's property.[4] Moreover, as Petitioner acknowledges, Pet. at 9-10, and the Court of Appeals found, 5a; 28a; 32a, when picketing resumed in late July, after Local 23 filed an unfair labor practice charge on June 2, 1986 concerning the denial of access *and the NLRB's General Counsel issued a complaint* on July 25, 1986 concerning that matter, Petitioner "conducted a relentless campaign to keep the pickets off its property" by seeking to enforce the state court injunction through the county sheriff and contempt proceedings against Local 23 and individual picketing employees.

6. Petitioner states that employees regularly worked at both its Hempfield and Greensburg stores from the time the Hempfield store opened. Pet. at 8. However, Petitioner fails to mention the Board's findings that the 11 employees in question: were employed at the Greensburg store and were members of the Steelworkers, which represented employees at the Greensburg facility; remained under the primary supervision of their Greensburg store supervisors and spent the majority of their working hours at the Greensburg store; performed the same work as they performed at Greensburg when they did work at the Hempfield store; and were expressly covered by a collective bargaining agreement between Petitioner and the Steelworkers. 44a; *see also* 187-191a. The Court of Appeals upheld the Board's findings. 17a-19a.

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[4] Although Petitioner did informally agree to allow two employees to handbill in its parking lot after obtaining the May 28, 1986 injunction, it later sought and obtained a total ban of all activities on its property after several weeks of peaceful handbilling. 175a.

SUMMARY OF ARGUMENT

1. The Board's conclusion that Petitioner violated Section 8(a)(1) of the Act by continuing to prosecute state court trespass litigation after the General Counsel issued a complaint concerning the denial of access was based on a permissible construction of the Act fully consistent with Supreme Court precedent. The Board's conclusion was based on its decision in *Loehmann's Plaza*, 305 N.L.R.B. 663 (1991). The Board in *Loehmann's Plaza* carefully construed and applied this Court's opinions in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978), and *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380 (1986). Based on this precedent, the Board permissibly determined that the General Counsel's decision to issue a complaint establishes an arguable case of protection, and thus federal preemption. In any event, the picketing and handbilling in question was found to be *actually*—not just *arguably*—protected by the Act; therefore, Petitioner's preoccupation with the question of whether the complaint made out an *arguable* case of protection is completely misplaced.

Petitioner argues that the Board's sole remedy to prevent an employer's use of state process to interfere with employee exercise of Section 7 rights after the Board has issued a complaint is to obtain a federal court injunction pursuant to Section 10(j) of the Act to oust the state court of jurisdiction. That argument is meritless. While a federal court injunction is plainly an available remedy *against the state court*, it does not detract from the existence of a remedy under the Act against the employer itself. Finally, it is simply untrue that employers in Petitioner's position are deprived of access to the state courts even where the Board later finds the union's conduct to be unprotected by the Act. *Loehmann's Plaza* merely requires an employer to *stay*, not *dismiss*, a pend-

ing state court trespass lawsuit after the General Counsel issues a complaint. If the Board later dismisses the complaint, the employer may renew the state court lawsuit.

2. The Board's finding that Petitioner violated Section 8(a)(1) of the Act by discriminatorily denying access to Local 23 and employee picketers and handbillers is supported by substantial evidence and raises no issues of general public importance. Petitioner's suggestion that the Board has circumvented the Court's holding in *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992) is highly misleading. The facts of *Lechmere* are clearly distinguishable and the disparate treatment rule that the Board applied to find a violation in this case has been explicitly endorsed by this Court.

Petitioner's real quarrel is with the Board's factual findings regarding the evidence of disparate treatment. Substantial evidence supports the Board's findings, which were in part based on the ALJ's credibility resolutions. By seeking review on the disparate treatment issue, Petitioner ignores this Court's opinion in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

3. The Board's decision to exclude 11 "dual function" or "dual location" employees from the bargaining unit is consistent with applicable precedent. This Court has held that the Board is accorded broad discretion in making bargaining unit determinations. For these reasons, the status of the disputed employees is only of importance to the parties in this case.

ARGUMENT

I. THE BOARD'S CONCLUSION THAT PETITIONER VIOLATED SECTION 8(a)(1) OF THE ACT BY CONTINUING TO PROSECUTE STATE COURT TRESPASS LITIGATION AFTER A COMPLAINT ISSUED WAS BASED ON A PERMISSIBLE CONSTRUCTION OF THE ACT FULLY CONSISTENT WITH THE DECISIONS OF THIS COURT

The sole ground upon which Petitioner urges the Court to grant certiorari as to the first question presented is that the Board's decision below—upheld by the Court of Appeals—and the rule of *Loehmann's Plaza,* 305 N.L.R.B. 663 (1991) upon which it was based are allegedly inconsistent with this Court's opinions in *Bill Johnson's Restaurants, Inc. v. NLRB,* 461 U.S. 731 (1983), *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters,* 436 U.S. 180 (1978) and *International Longshoremen's Ass'n. v. Davis,* 476 U.S. 380 (1986). As we demonstrate below, Petitioner's argument does not withstand scrutiny.

In *Loehmann's Plaza,* the Board held that once the Board's General Counsel issues a complaint alleging the unlawful exclusion of employees or union representatives from an employer's property, an employer who either initiates a state court proceeding against an asserted trespass or who fails to take prompt action to stay an already commenced proceeding violates Section 8(a)(1) of the Act. 305 N.L.R.B. at 671-72.

Petitioner attacks that holding as contrary to the holding in *Bill Johnson's* that there is a "right of access to the courts" which is "an aspect of the First Amendment right to petition the Government for redress of grievances." Pet. at 13. The existence of a right of access to the courts is simply beside the point. The point is that there can be no right of access to state courts as to matters over which they lack jurisdiction, e.g., on preemption grounds. Indeed, as Petitioner concedes, *id.*, the Court in *Bill John-*

son's noted that it was "not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal law preemption. . . ." 461 U.S. at 737-38 n.5.[5] Since, as we show below, the state court trespass suit was preempted upon the General Counsel's issuance of a compalint, footnote five of *Bill Johnson's* plainly forecloses Petitioner's claim that it has a constitutional right to have its trespass claim determined by the state courts.[6]

Contrary to Petitioner's suggestion, Pet. at 15-16, in reaching its decision, the *Loehmann's Plaza* Board carefully construed and applied this Court's opinions in *Bill Johnson's, Sears* and *Davis,* as well as *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236 (1959). *Loehmann's Plaza,* 305 N.L.R.B at 669-71. *Garmon* and *Sears* clearly establish that federal preemption of state court jurisdiction occurs "at least by the time the General Counsel has acted to place the issue before the Board by issuing a complaint." *Id.* at 670 (footnote omitted). In *Garmon,* the Court announced the following broad rule concerning federal preemption:

> When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts

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[5] What Petitioner neglects to mention is that the Court further stated that the Board may enjoin such suits. *Id.* Pursuant to footnote five of *Bill Johnson's,* the Board has enjoined employers from maintaining preempted lawsuits interfering with conduct protected by the Act. *See, e.g., American Pacific Concrete Pipe Co.,* 292 N.L.R.B. 1261 (1989); *Loehmann's Plaza, supra*; *Great Scot, Inc.,* 309 N.L.R.B. No. 84 (1992).

[6] No serious constitutional questions are raised by an order prohibiting a party from maintaining a preempted lawsuit. No basis therefore exists for applying the canon of statutory construction utilized in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council,* 485 U.S. 568, 575 (1988). On the other hand, the state court's injunction and decision rejecting Local 23's preemption defense collided with the Supremacy Clause in Article VI of the United States Constitution. *See Davis, supra,* 476 U.S. at 388 ("Pre-emption [is] the practical manifestation of the Supremacy Clause").

> must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national labor policy is to be averted. 359 U.S. at 245.

This Court has applied the *Garmon* preemption rule in numerous subsequent cases, including *Sears*. *See Sears, supra,* 436 U.S. at 187-90. The question presented in *Sears* was whether the Act "deprives a state court of the power to entertain an action by an employer to enforce state trespass laws against picketing which is arguably—but not definitely—prohibited or protected by federal law." *Id.* at 182. This Court held that the state court trespass suit was not preempted; however, the holding was predicated on the fact that the picketing union never filed an unfair labor practice charge, and thus the employer had no means of invoking the Board's jurisdiction to determine whether the trespassory picketing was protected under the Act. *See, e.g., id.* at 201-03 & 207.

Insofar as Petitioner contends that a state court trespass suit is not preempted by the Board's exclusive jurisdiction until the Board issues a decision finding a violation of Section 8(a)(1), there is no support in any of the *Sears* opinions for such an extreme position. As the Court of Appeals observed, Justice Stevens' majority opinion did not specifically state when preemption occurs, but it "strongly suggested that the union's filing of an unfair labor practice charge is sufficient in and of itself to trigger preemption." 34a; *see, e.g., Sears, supra,* at 206 (to avoid risk that state court will enjoin protected trespassory activity, "the union is likely to invoke the Board's jurisdiction and thereby avoid the state forum"); *id.* at 207 (if the union files an unfair labor practice charge, "the protection question would then be decided by the agency experienced in accommodating . . . § 7 . . . and . . . property rights . . . in the context of a labor dispute"). Justice Blackmun's and Justice Powell's concurrences dated preemption as of the filing of the charge and the issuance of the complaint, respectively, while the three dissenting Justices argued that trespass suits are preempted

even in cases where the union does not file a charge. 34a; *Sears, supra,* at 209 (Blackmun, J. concurring); *id.* at 212-14 (Powell, J., concurring); *id.* at 222-24 (Brennan, J., dissenting).

The Board's rule in *Loehmann's Plaza* was thus based on the most conservative approach taken in the various *Sears* opinions, that of Justice Powell. 34a. In determining that the General Counsel's issuance of a complaint is what triggers preemption, the *Loehmann's Plaza* Board was influenced in large measure by this Court's opinion in *Davis,* particularly the quoted passage from *Davis* reproduced at page 15 of the Petition.[7] 305 N.L.R.B. at 670.

Petitioner relies on this passage from *Davis* to support its *apparent* contention that, even if preemption occurs upon the General Counsel's issuance of a complaint, an employer who has filed a state court trespass action should nevertheless be permitted to have the preemption issue resolved by a court. Pet. at 16-18.[8] However, *Davis*

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[7] The quoted passage is as follows:

> The precondition for pre-emption, that the conduct be "arguably" protected or prohibited, is not without substance. It is not satisfied by a conclusory assertion of pre-emption and would therefore not be satisfied in this case by a claim, without more, that Davis was an employee rather than a supervisor. If the word "arguably" is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that the Board could legally decide in his favor. That is, a party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been "authoritatively rejected" by the courts or the Board . . . . The party must then put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation.

Davis, supra, 476 U.S. at 394-95.

[8] We emphasize the word "apparent" because Petitioner concedes that its First Amendment right to petition the government for a redress of grievances is "meaningful" if the General Counsel "proceed[s] to a Board hearing on the complaint and seek[s] a cease

provides no support for this specious argument. In the first place, *Davis* makes clear that: (1) Congress vested the Board with exclusive jurisdiction over administration of the Act; (2) the Board's exclusive jurisdiction necessarily, "by operation of the Supremacy Clause, pre-empt[s] conflicting state court jurisdiction" and; (3) the Board's "administrative rather than judicial [capacity] . . . does not alter the pre-emptive effect of the federal law." 476 U.S. at 393 n.11. Secondly, *Davis* teaches that the party asserting preemption has "the burden of showing at least an arguable case before the jurisdiction of a state court will be ousted." *Id.* at 396. Where such a showing is made, however, the preemption issue is "to be decided initially by the NLRB, not the state courts." *Id.* at 394.[9]

The Board in *Loehmann's Plaza* permissibly determined that the burden of showing that trespassory union picketing or handbilling is arguably protected by the Act is satisfied by the General Counsel's decision to issue a complaint. 305 N.L.R.B. at 670. As the Court of Appeals succinctly observed:

> "[B]efore the General Counsel issues a complaint, he conducts an investigation in order 'to ascertain, ana-

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and desist order or other appropriate relief if the allegations are decided in its favor." Pet. at 18. That is precisely what occurred in this case. Moreover, Petitioner litigated the preemption issue at every stage of the unfair labor practice proceedings, i.e., before the ALJ, Board and Court of Appeals. 5a-6a; 32a-36a; 41a-43a; 167a-185a. Additionally, Petitioner litigated the preemption issue in the state court proceedings. 105a-106a; 109a; 119a-124a.

[9] In *Davis*, no unfair labor practice charge was filed concerning whether Davis was an "employee" covered by the Act, *id.* at 383-85; thus, the state court entertaining Davis' tort claim was the only forum presented with the preemption issue. Here, in contrast, Local 23 filed a charge, which invoked the Board's jurisdiction to decide the preemption issue. The fact that the state court resolved the preemption issue against Local 23 after the state court's jurisdiction was preempted by the Board's General Counsel's issuance of a complaint, 41a-42a; 119a-121a, highlights the constitutional infirmity with Petitioner's position.

> lyze and apply the relevant facts.'" [*Loehmann's Plaza*], 305 N.L.R.B. No. 81 at 8 (citing NLRB Casehandling Manual). According to the Board's regulations, a complaint will issue only if "the charge appears to have merit." 29 C.F.R. § 101.8. "If investigation reveals that there has been no violation of the Act or evidence is insufficient to substantiate the charge," no complaint will issue. 29 C.F.R. § 101.5. The Company cannot credibly contend that a claim that makes it through this gauntlet does not concern conduct "arguably" protected by the NLRA.

35a-36a. In view of the thorough investigation of unfair labor practice charges conducted by the General Counsel before deciding whether to issue a complaint, an unfair labor practice complaint plainly represents far more than "mere allegations of a violation of the Act by the Board's General Counsel." Pet. at 16 & 18.

In any event, in this case the General Counsel presented credible evidence in support of the complaint at a hearing before an ALJ, who made findings and conclusions to the effect that Petitioner unlawfully maintained its state court trespass lawsuit post-complaint, the Board affirmed the ALJ's findings and conclusions, and the Court of Appeals upheld the Board's decision and order. The picketing and handbilling in question was thus *actually*—not just *arguably*—protected by the Act. Even Petitioner agrees that "there is a constitutional objection to state-court interference with conduct actually protected by the Act." *Sears, supra,* 436 U.S. at 199 (footnote omitted). *See* Pet. at 17 n.3. Given the *actually* protected nature of the picketing and handbilling, Petitioner's preoccupation with the question of whether the complaint made out an *arguable* case of protection is completely misplaced.

In this regard, Petitioner, citing footnote 43 of the majority opinion in *Sears,* proposes a rule whereby the Board, following issuance of a complaint, must obtain a federal court injunction pursuant to Section 10(j) of the Act, 29 U.S.C. § 160(j), to oust the state court of jurisdiction. Pet. at 17-18. This proposal is utterly meritless.

First, it ignores this Court's admonition in *Garmon* that where arguably protected conduct is involved, "the federal courts" as well as state courts "must defer to the exclusive competence of the . . . Board." 359 U.S. at 245. Second, the four opinions in *Sears* teach that the Board's jurisdiction becomes exclusive no later than the point when the General Counsel decides to issue a complaint. Third, neither footnote 43 of *Sears* nor the cases cited therein even remotely suggest that a state court order enjoining conduct protected by the Act is not preempted unless and until the Board persuades a federal judge to enjoin the state court proceedings.[10] Fourth, Section 10(j) injunctions are extraordinary remedies. Petitioner's proposed rule would unduly burden both the Board's and the federal judiciary's limited resources. Fifth, Petitioner improperly assumes that state court judges faced with a claim that a trespass suit is preempted by federal law will invariably reject such claims; experience shows that many state courts duly consider the applicable federal jurisprudence regarding preemption. *See, e.g., Loehmann's Plaza, supra,* 305 N.L.R.B. at 671 n.52 and cases cited therein. Thus, no legitimate purpose would be served by a rule requiring the Board to pursue a Section 10(j) injunction.

Finally, it is simply untrue that under the *Loehmann's Plaza rule*, "an employer such as Petitioner is deprived of its access to the state courts—even if a union's conduct is later found by the Board to be unprotected under the Act." Pet. at 16. *Loehmann's Plaza* merely requires an employer to *stay*, not *dismiss*, a pending state court lawsuit within seven days of the General Counsel's issuance of an unfair labor practice complaint. 305 N.L.R.B. at 671. If the Board later dismisses the complaint, the employer may renew its state court lawsuit. *Id.* at 672 n.56

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[10] Petitioner erroneously states, Pet. at 17, that *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971) and *Capital Service, Inc. v. NLRB*, 347 U.S. 501 (1954) are examples of the Board requesting an injunction from a federal district court pursuant to Section 10(j) of the Act. *See* 404 U.S. at 142; 347 U.S. at 502-04.

("state court jurisdiction is preempted [only] until such time as the Board holds the picketing or handbilling to be unprotected"). *Accord*, *Davis*, *supra*, 476 U.S. at 397 (court must defer to Board if there is an arguable case for preemption but "if the Board decides that the conduct is not protected or prohibited . . . the court [may] entertain the litigation").

In sum, the Board's conclusion that Petitioner violated Section 8(a)(1) of the Act by maintaining its state court trespass suit after the General Counsel issued a complaint concerning the denial of access was based on a permissible construction of the Act consistent with this Court's precedent. The Board is entitled to judicial deference where, as here, it interprets an ambiguous provision of the statute it administers. *NLRB v. Food & Commercial Workers, Local 23*, 484 U.S. 112, 123 (1987). *Cf. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*, 467 U.S. 837, 842-43 (1984). And where, as here, the Board's construction of the Act is "reasonable," it should not be rejected "merely because the courts might prefer another view of the statute." *Pattern Makers' League of North America v. NLRB*, 473 U.S. 95, 114 (1985), quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979). Petitioner's first question presented does not warrant review.

II. THE BOARD'S FINDING THAT PETITIONER VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCRIMINATORILY DENYING ACCESS TO LOCAL 23 AND EMPLOYEE PICKETERS AND HANDBILLERS IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND RAISES NO ISSUES OF GENERAL PUBLIC IMPORTANCE

Regarding the second question presented, Petitioner urges the Court to grant certiorari solely on the ground that the Board's "repeated reliance" on a disparate treatment analysis in decisions issued after this Court's opinion in *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992) al-

legedly "makes the discriminatory access issue one of general public importance." Pet. at 19 & 23. Petitioner's argument, we submit, is frivolous and should be categorically rejected.

Petitioner suggests that the Board has circumvented the holding in *Lechmere* that an employer with a nondiscriminatory no-solicitation/distribution policy did not violate the Act by ejecting from its property nonemployee union organizers seeking to organize its employees because the employees were otherwise accessible to the union, 112 S.Ct. at 843-44, 849-50, by "affirming Section 8(a)(1) findings originally based upon the accommodation principles of *Jean Country*, 291 N.L.R.B. 11 (1988), by finding a discriminatory denial of access to union pickets." Pet. at 19 (citations omitted). This suggestion is highly misleading.

From the outset this case was litigated based on a disparate treatment theory. 54a-56a. As Petitioner concedes, the ALJ "found that Petitioner violated Section 8(a)(1) by discriminatorily refusing to permit Local 23 to picket and handbill on its Hempfield property 'while permitting other organizations access to its property for purposes of soliciting its customers and related activities'" and the Board "upheld the 8(a)(1) finding, 'solely because of [Petitioner's] disparate treatment of protected union activity.'" Pet. at 19 (citations to deferred appendix omitted). This is clearly not a case in which the Board changed its legal theory midstream to circumvent a decision of this Court. Nor has the Board "repeatedly" relied on a disparate treatment analysis in every case involving denials of access to private property it has decided since *Lechmere*. *See, e.g., Bristol Farms, Inc.*, 311 N.L.R.B. No. 46 (1993); *Payless Drug Stores Northwest, Inc*, 311 N.L.R.B. No. 68 (1993).

Lechmere's applicability to this case is marginal, at best. In contrast with the record evidence herein, there was no evidence in *Lechmere* that the employer discrimi-

natorily denied the union access to its property while permitting other groups access; in fact, "Lechmere consistently enforced [its no-solicitation/distribution] policy . . . (against, among others, the Salvation Army and the Girl Scouts)." 112 S.Ct. at 844 n.1.[11] And *Lechmere* reaffirmed this Court's decisions in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) and *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978), both of which explicitly endorsed the Board's longstanding disparate treatment theory. *See, e.g., Babcock & Wilcox, supra*, at 112 (emp'oyer may deny access to nonemployee union organizers to distribute union literature to employees if employer "does not discriminate against the union by allowing other distribution"); *Sears, supra*, at 205 (to gain access, union may show that "the employer's access rules discriminate against union solicitation") (footnote omitted).[12]

Moreover, whereas in *Lechmere* the persons denied access were nonemployee union organizers, in this case the persons denied access included Petitioner's own employees. This Court has stressed that there is a substantial "distinction between rules of law applicable to employees and those applicable to nonemployees." *Babcock & Wilcox, supra*, at 113 (footnote omitted); *Lechmere, supra*, at 846; *see also Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). Accordingly, even if there was no evidence that Petitioner's access rules were discriminatory, the holding in *Lechmere* would not control the outcome of this case.

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[11] In this case, there was no record evidence that Petitioner even had a no-solicitation/distribution policy.

[12] The majority opinion in *Lechmere* rejected the Board's "accommodation," or "multi-factor balancing," test adopted in *Jean Country*, at least as applied to nonemployee union organizers. 112 S.Ct. at 847-48. However, the Court did not disturb the disparate treatment prong of the *Jean Country* standard. *See Jean Country, supra*, 291 N.L.R.B. at 12 & n.3.

Petitioner's real quarrel is with the factual findings the Board made regarding the record evidence of disparate treatment. Pet. at 19-21 & 23. Among other things, Petitioner argues that: it only granted isolated access to charitable organizations and representatives of another union; it "permitted" Local 23 access pursuant to an agreement with the union; it "imposed nothing more than legitimate 'time, place, and manner' restrictions on the conduct at issue," and; Local 23 engaged in "mass picketing" that caused "disruption" to business. *Id.* However, substantial evidence in the record supports the Board's factual findings, which in part were based on credibility resolutions made by the ALJ. Indeed, the Court of Appeals "uph[e]ld the Board's order in all respects," finding it "completely supported by the facts and . . . based on the proper application of federal labor law." 2a.[13] Thus, by seeking review on the disparate treatment issue, Petitioner ignores this Court's admonition in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951):

> Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied. *Id.* at 490-91.

Plainly, the Board's reliance on the disparate treatment theory, a theory long employed by the agency and specifically endorsed by this Court, does not make the second issue presented one of public importance. And Petitioner's disagreement with the agency's factual findings concerning disparate treatment certainly is not a matter of public importance which merits an expenditure of the

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[13] The Court of Appeals observed that its decision was "largely fact-driven, as were the Board's determinations." 3a.

Court's time and resources. Therefore, the Court should deny review.

III. THE BOARD'S DECISION TO EXCLUDE 11 "DUAL FUNCTION" OR "DUAL LOCATION" EMPLOYEES FROM THE BARGAINING UNIT IS CONSISTENT WITH APPLICABLE PRECEDENT AND RAISES NO ISSUES OF GENERAL PUBLIC IMPORTANCE

Contrary to Petitioner's assertion that it "involves an issue of general public importance rather than one of concern only to the parties to this dispute," Pet. at 28-29, the third question presented concerns matters so plainly insubstantial that it warrants only brief comment. This Court has held that in making bargaining unit determinations such as the one at issue here, "the Board is accorded broad discretion," *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 171 (1971), and its decisions are "rarely to be disturbed." *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947).

Here, the Board's decision to exclude the 11 "dual function" (or, as the Court of Appeals termed them, "dual location") employees from the bargaining unit is entitled to deference: it was well-reasoned and supported both by applicable Board precedent, *see, e.g., Otasco, Inc.*, 278 N.L.R.B. 376 (1986), and the Court of Appeals' decision in *Bentsen Contracting Co. v. NLRB*, 941 F.2d 1262, 1265-67 (D.C. Cir. 1991).[14] Contrary to Petitioner's suggestion, Pet. at 24-25 & 28, the Board's determination to exclude the 11 employees does not conflict with *Berea Publishing Co.*, 140 N.L.R.B. 516 (1963). Unlike the instant case, *Berea Publishing* did not involve employees represented by another union at their primary workplace and covered by a collective bargaining agreement between the employer and the other union. Hence, there was no danger of "including the same job

[14] Petitioner's efforts to distinguish *Otasco* and *Bentsen Contracting*, Pet. at 26-28, are clearly unpersuasive.

categories in two bargaining units[, an outcome] . . . necessarily at odds with the principle of exclusive representation." *Bentsen Contracting, supra,* at 1267.

In view of the broad discretion accorded to the Board's bargaining unit determinations and the absence of any conflict between the instant unit determination and applicable Board or judicial precedent, the status of the 11 "dual function" employees is only of importance to the parties in this case. We submit that the real reason why Petitioner pursues this issue is because, as it argued to the Board, "including [the employees] in the unit would negate the Union's majority status." 43a. While Local 23's majority status is important to the parties, it does not involve an issue of general public importance warranting the attention of this Court.

CONCLUSION

For the foregoing reasons, Local 23 respectfully requests that the Court deny the Petition for Writ of Certiorari filed by Davis Supermarkets, Inc.

Respectfully submitted,

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